Supreme Court, U.S.
FILED
OCT 13 1998
CLERK

(3)

No. 98-440

*IN THE*
*SUPREME COURT OF THE UNITED STATES*

October Term, 1998

Roger M. Donlon et al., *Petitioners*

v.

City of Oxnard et al., *Respondents*

On Petition For a Writ of Certiorari
To The Court of Appeal of
the State of California
Second Appellate District, Division Six

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 pgs

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**REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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The Donlons respectfully reply to the Brief filed in this case by the City of Oxnard (City) in Opposition to the Donlons' Petition for a Writ of Certiorari.

**A. The City's Statement of the Case misstated material facts.**

The City's abbreviated "Statement of the Case" asserts that the City formed the District

> "to finance the construction of streets, highways and other infrastructure which would support the development of the land."

City's Brief in Opposition to the Donlons' Petition for Writ of Certiorari (City's Brief) at p. 1.

Then, the City asserts

> "[t]he project did not go forward because of adverse economic conditions."

City's Brief at p. 1.

These assertions are materially false and misleading.

The unvarnished truth is that at the sole behest of the Donlons' debtor (Developer) the City formed the District to provide the Developer with tax-free bond financing to be used exclusively for a "project" which only involved the private improvement, and private (for profit) sale of property which is NOT subject to this foreclosure action (Commercial Land). CT 1817.[1] That "project" (the development and sale of the Commercial Land) went forward as planned. The so called *special tax* of **$32,471,000** at issue here was imposed on different property (Farm Land). The City (and Donlons' debtor) purportedly obligated the Farm Land (which is the sole property subject to this foreclosure action) to pay for over 86% of the cost of the bonds the District issued to finance the private development and private (for profit) sale of the Commercial Land. CT 1818. At all relevant times, the Farm Land was separate and apart from the Commercial Land. CT 1816. The Farm Land received no benefit from the tax-free bond financing the City used to finance the Developer's private development and private (for profit sale) of the Commercial Land. CT 264, 1182, 2482, 1863.

The Donlons were never involved in the "project" (the private development and private sale of the Commercial Land for private profit) which the City financed with the tax-free bonds. All the Donlons ever held was an interest in a promissory note secured by a first deed of trust duly recorded against the Farm Land. CT 9-10; 2779; 2786.

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[1]CT refers to the clerk's transcript.

The Donlons' complete loss of their lien against the Farm Land was not occasioned by a "bad investment." Quite to the contrary, it was solely caused by a State court judgment which wiped out the Donlons' lien to pay the delinquent portion of the *special tax* the City imposed on the Farm Land to pay the tax-free bondholders for money freely lent to the Developer (and laundered through the City) with full knowledge of the Donlons' previously recorded lien against the Farm Land.

In sum, the real estate market had nothing to do with the Donlons' loss of their security. Absent the State court judgment at issue here, when the Donlons' note was not paid as agreed, the Donlons would have quickly and easily acquired the underlying security (free and clear fee title to the 181 acres of Farm Land) by non-judicial foreclosure of that security.

**B. The Donlons' federal grounds for relief were adequately stated.**

Article I, § 10 to the United States Constitution (Contract Clause) prevents a State from pursuing even its legitimate policies of health, safety, **and taxation** with "studied indifference" to the Contract Clause. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Van Hoffman v. City of Quincy*, 71 U.S. (4 Wall) 535 (1866); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

Where, as here, a State law substantially impairs an existing contract, to pass constitutional muster the State must demonstrate a significant and legitimate public purpose behind that law such as remedying a broad and general social or economic problem AND narrowly draw its law to effect that purpose. *Energy Reserves Group,*

*Inc. v. Kansas City Light & Power Co.* (1983) 459 U.S. 400, 412-413. This so called "strict scrutiny" test is commonly thought of as this Court's doctrinal shorthand for saying a State law which impairs existing contracts or the means of enforcing them is per se unconstitutional.

Frankly, it is hard to imagine a case which involves a more clear and certain violation of the Contract Clause; yet the City asserts

> "the Donlons' unhappiness at having made a bad investment decision in 1987 is no reason why the Court should grant their petition in 1998 because neither of the criteria set forth in Rule 10 for granting a petition for a writ of certiorari to review a decision of a state court has been met."

City's Brief at p. 3.

If this assertion is correct, the Contract Clause, and the decisions of this Court involving it, provide creditors in State court proceedings with no more protection than a can opener.

**C. This Case is not governed by "special assessment" cases.**

The City asserts "[t]he situation in the case at bar has arisen repeatedly in the context of special assessment districts." City's Brief at p. 3.

This assertion is both legally and factually impossible. By definition, "special assessments" are not taxes. They are charges imposed on specially benefitted property for a benefit specially conferred on that property. *See, e.g.,*

*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141-142. While it may be true that the holder of a lien against property subject to a special assessment may not be entitled to notice of the special assessment proceeding because (by definition) the lien imposed to pay the special assessment cannot exceed the additional value conferred on the specially assessed property (and therefore cannot adversely affect the lienholders' security interest in that property); these special assessment "principles" have no application to the case at bar.

The question presented here is whether the City could constitutionally impose a **$32,471,000** "*special tax*" on the Farm Land without notice to the lienholders where that *special tax* did not confer any benefit on the Farm Land and that *special tax* **only required the lienholders' debtor to vote for it** AND that *special tax* destroyed the lienholders' security. That question has been finally settled in the Donlons' favor by both *Horn v. County of Ventura* (1979) 24 Cal.3d 605 and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). The City's citation to cases which apply only to "special assessments" are, at best, clearly inappropriate, both legally and factually. See the City's Brief at p. 4.

**D. State court unpublished opinions are unconstitutional.**

Before the Civil War, the United States Constitution's impact on the States was limited to the Contract Clause and a few other provisions not relevant here. Following the Confederate defeat, Congress moved swiftly to extend basic liberties to the citizens of every State. It adopted three new Amendments, starting with the Thirteenth Amendment (1865) which outlawed slavery in every State and culminating with the Fifteenth Amendment (1869)

which guaranteed blacks and former slaves the right to vote in Federal and State elections. In the center stands the Fourteenth Amendment, ratified in 1868, which provides (with emphasis added) that:

> **"[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of** life, liberty, or **property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"**

United States Constitution, Fourteenth Amendment.

Two concepts are firmly rooted in the Fourteenth Amendment. First, its noble promise of "equal protection of the laws" only applies to the States. Second, that promise was made and the Fourteenth Amendment was adopted because the States could not be trusted to voluntarily keep their constitutional obligations.

In support of its position that unpublished opinions in State proceedings pass constitutional muster the City only cited federal cases dealing with federal decisions. See the authorities cited in the City's Brief at pp. 5-6. These cases are clearly inappropriate. The Fourteenth Amendment has no application to the federal government or the cases decided by its courts. Also, unlike the federal cases City cited, California does have a law which requires its appellate courts to decide each and every case by written opinion with reasons stated. California Constitution, Article VI, § 14.

The City also argues that the California law on

unpublished appellate court opinions satisfies the Fourteenth Amendment's equal protection guarantee because "the doctrines of res judicata, law of the case, and collateral estoppel" apply to these unpublished opinions. See the City's Brief at p. 6.

This argument conveniently disregards the point. The Fourteenth Amendment demands far more than the uniform application of "the doctrines of res judicata, law of the case, and collateral estoppel." At a bare minimum it mandates that

> "[no] State [shall] deprive any person of life, liberty or property without due process of law; **nor deny to any person within its jurisdiction equal protection of the laws**"

United States Constitution, Fourteenth Amendment; emphasis added.

Not only has this Court never addressed the question of whether a State judiciary has the constitutional power to withhold the final outcome of a case or controversy decided by a State appellate court in a written opinion "with reasons stated" from public view; it is hard to see how judicial secrecy promotes judicial economy or otherwise reduces the burdens placed on an "overworked judiciary" as the City alleges. See the City's Brief at p. 5.

In California over 90% of the opinions issued by its appellate courts are unpublished. For what purpose? Why are virtually all the trial courts, appellate courts, and attorneys deprived of the wisdom of these decisions? Why do over 90% of the opinions issued by a California appellate court only uniquely and specially apply to the

litigants before that court? Why are both the California legislature and the people of that great state routinely denied the right to know how California's appellate courts are applying the law? How can withholding the results of a California appellate court decision from public view promote judicial efficiency, reduce the cost or uncertainty of litigation or lighten the judicial workload? Isn't it virtually certain that the publication of all State appellate court decisions would bring clarity and certainty to the law as well as greatly reduce the burdens now imposed on the courts and those who appear before them?

More important to the case at bar; how can the City maintain (or this Court hold) that the Fourteenth Amendment's promise of "equal protection of the laws" is satisfied where over 90% of California's appellate court decisions are uniquely and specially crafted to apply only to the litigants in a particular proceeding (especially in this case where the unpublished State court opinion directly contradicts all prior published precedent)?

This case calls for facing uncomfortable truths: unpublished opinions are too easily manufactured; they undermine the integrity of our entire justice system; they foster naked, unrestrained judicial power; they assist in the creation and destruction of laws approaching tyranny; they invite State courts charged with the solemn responsibility of protecting constitutional rights to destroy those rights; they undermine the public's confidence in the judicial system; they ostracize all but a few from the law; they make a mockery of our most cherished concept that the United States is a nation "indivisible -- with liberty and justice for all."

It is time this Court forced the State courts out of the shadow of unpublished opinions and made them march forthrightly into the bright sunshine of public review.

Publication of all State appellate court opinions is not only a small price to pay to fulfill the United States Constitution's promise of "equal protection of the laws;" it is the minimum price the Fourteenth Amendment commands of State courts.

## CONCLUSION

No matter how hard one tries, quicksilver inevitably escapes the grasp. It somehow slithers past the fingers or escapes through some other tiny crevice only to run up the arm or over the back of the hand or past the fingers to wherever it pleases. It simply cannot be confined without a vessel.

Like quicksilver, unpublished opinions in State court proceedings can (and often do) find a path of their own. Freed from public view, the law of the land often yields to passion, greed or corruption; the noble promise of "justice for all" frequently surrenders to a State judiciary which can (and often does) twist and distort the law into whatever form it pleases whenever it pleases for whatever purpose it then craves to achieve.

Time and again this Court has used the constitutional promise of "due process of law" and "equal protection of the laws" to stamp out discrimination in every public place save one: State appellate courts.

In today's climate, the lurking problems of State unpublished opinions cannot be brushed aside. As this case clearly demonstrates, a State appellate court's unbridled ability to publish or not publish its decisions can, and often does, form an impenetrable barrier that works not only to shield otherwise invidious discrimination; but to deprive the litigants of their most sacredly guaranteed constitutional rights.

In this case we are not only talking about principles of equality enshrined in the Fourteenth Amendment and equally applicable to all branches of a State government, we are talking about the very essence of our constitutional form of government. State court opinions which are not published work in all kinds of covert and subtle ways to destroy that government. The effect is corrosive and unjustified. The success of our judicial system rests not so much on the ability of its courts to routinely reach the correct decision; but on the public's faith in the integrity of the judicial system itself. Only the most naive would place their faith and trust in a State judicial system which secretes over 90% of its appellate court decisions from public view when public access is now, more than ever, so easy, painless, and inexpensive.

In short, State court unpublished opinions are the antithesis of our constitutional form of government. In their wake they leave a stench which permeates the entire judicial system.

Now is the time to put a stop to State court unpublished opinions. The Donlons and all other Americans have the constitutional right to have their case judged and decided by a State court in a published opinion issued in compliance with published precedent.

Respectfully submitted,

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